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# Rehabilitating Rehab through State Building Codes

Sara Bronin

*University of Connecticut School of Law*

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# THE YALE LAW JOURNAL

SARA C. GALVAN

## Rehabilitating Rehab Through State Building Codes

**ABSTRACT.** Building codes are not neutral documents. Traditional codes have the effect of deterring the rehabilitation of older structures. But rehabilitation—which can have many positive effects, especially on cities—should be encouraged, not deterred. One promising method of encouraging rehabilitation has been the adoption of “rehabilitation codes”: building codes that establish flexible but clear requirements for renovators. After analyzing traditional building codes and three different rehabilitation codes, this Note concludes that more states should adopt mandatory rehabilitation codes.

**AUTHOR.** Yale Law School, J.D. expected 2006; University of Oxford, M.Sc. 2003; University of Texas, B.Arch./B.A. 2001. The author would like to thank Tad Heuer and Professor Robert C. Ellickson for their editorial contributions.



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## INTRODUCTION

Building codes are not neutral documents. On their face, codes—which govern nearly all of the \$650 billion of private construction occurring annually in the United States<sup>1</sup>—dictate how strong our structures must be, what materials we can use, and how we should prepare for fires, earthquakes, and other hazards. But codes affect much more: They create incentives to build certain types of structures, they establish economic biases toward particular materials and construction methods, and they impact urban layouts. Perhaps most significantly, traditional building codes have the negative effect of deterring rehabilitation: the improvement of older buildings through repair, reuse, preservation, or restoration. Few jurisdictions specifically address older buildings in their codes, instead subjecting most rehabilitation projects to the same standards as new construction. Applying such standards can make building a new structure less expensive than rehabilitating an old one, thereby discouraging beneficial rehabilitation projects.

To the delight of many unlikely allies—builders, affordable housing experts, environmentalists, and preservationists—a few jurisdictions have begun designing codes that depart from traditional building codes and specifically encourage the renovation of older structures. These “rehabilitation codes” (or “smart codes”)<sup>2</sup> differ dramatically from traditional codes in that rehabilitation code standards are applied proportionately to the scope of construction efforts. If the work is minor—say, a repair—then only minimal requirements apply; if the work is major—a reconstruction or an addition—then stricter requirements apply. Moreover, rehabilitation codes contain clear guidelines that enable builders to accurately predict their expenses; by contrast, builders often cannot be sure how code officials will apply the traditional codes to older structures.

The power to draft building codes has long resided with the states, the vast majority of which have assigned that power to local governments. The many jurisdictions that have adopted traditional codes have recognized that basic building regulations are essential because they reduce negative externalities that may be produced by substandard, nonregulated structures, and because

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1. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, VALUE OF CONSTRUCTION PUT IN PLACE: MAY 2003, at 5 (2003), *available at* <http://www.census.gov/prod/2004pubs/c30-0305a.pdf> (including both new construction and rehabilitation but excluding, among other figures, the expenditures on new manufactured homes). For an explanation of what constitutes “construction” and “value,” see *id.* at A-1.
  2. This Note avoids the phrase “smart code” because some planners use that phrase to refer to certain zoning (and not building) codes.

they provide consumer protection.<sup>3</sup> Without codes, builders have incentives to underinvest in safety features<sup>4</sup> such as fire-resistant materials or plumbing, electrical, and heating equipment designed to prevent the spread of disease. With codes, builders are required to consider the external effects of their structures.<sup>5</sup> Building codes also have the potential to combat crime and terrorism<sup>6</sup> and to prevent widespread structural collapse and loss of life during earthquakes.<sup>7</sup> This is because the technical requirements embodied in the codes, drafted by industry experts, ensure a minimum standard of quality. The guidance provided by codes is especially critical when individuals related to the construction project—such as buyers, owners, or occupants—lack independent technical expertise.

While the rationale behind traditional codes is clear, few have recognized that we also need rehabilitation codes: Only a tiny fraction of the 10,000 jurisdictions with traditional building codes<sup>8</sup> have adopted rehabilitation codes. In this Note, I contend that rehabilitation codes are both feasible and necessary. Part I argues that rehabilitation should be encouraged—and explains how traditional coding has failed to do so. Part II describes how various

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3. See, e.g., STEPHEN R. SEIDEL, *HOUSING COSTS & GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE* 73-74 (1978); A.G. Arlani & A.S. Rakhra, *Building Code Assessment Framework*, 6 CONSTRUCTION MGMT. & ECON. 117, 118 (1988); Harold M. Hochman, *The Over-Regulated City: A Perspective on Regulatory Procedures in the City of New York*, 9 PUB. FIN. Q. 197, 199 (1981). But see Sharon M. Oster & John M. Quigley, *Regulatory Barriers to the Diffusion of Innovation: Some Evidence from Building Codes*, 8 BELL J. ECON. 361, 364 (1977) (“Neither of these arguments, based on consumer protection or externalities, is fully convincing, at least as a justification for detailed code provisions relating to private dwellings currently in force in different communities.”).
  4. See Carl R. Gwin & Seow-Eng Ong, *Homeowner Warranties and Building Codes*, 18 J. PROP. INV. & FIN. 456 (2000). But cf. Peter F. Colwell & Abdullah Yavas, *The Value of Building Codes*, 20 J. AM. REAL EST. & URB. ECON. ASS’N 501, 514 (1992) (stating that “a contract is a more efficient way of obtaining the first-best solution than are building codes, because a contract does not require the authorities to determine the least cost technology and the optimum level of safety”).
  5. See SEIDEL, *supra* note 3, at 74.
  6. One commentator has called for model codes to put a greater emphasis on domestic crime prevention. See Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1091 (2002). On the terrorism front, Mayor Michael Bloomberg and others have proposed revisions to New York City’s building code that would require that commercial buildings be built to withstand large-scale terrorist attacks. See Anna Hughes, *Changes Proposed to New York City Building Code in Response to September 11 Terrorist Attacks*, CIV. ENGINEERING., Jan. 2004, at 22, 22 (stating that such revisions include installing sprinkler systems, refitting exit stairwells, and implementing various structural requirements).
  7. See Bill Coffin, *Earthshaker*, RISK MGMT., Mar. 2004, at 48, 48.
  8. See Colwell & Yavas, *supra* note 4, at 501.

institutions have responded to traditional codes' failure to address rehabilitation. A discussion of early approaches to rehabilitation precedes a discussion of three recent rehabilitation codes: the mandatory statewide code of New Jersey, the federal model code adopted in Maryland, and the International Existing Building Code adopted in Pennsylvania. Part III urges the adoption of mandatory rehabilitation codes at the state level and lays out a strategy for overcoming the main barrier to the adoption of mandatory coding: institutional inertia, including active opposition from code officials who feel that they lack the resources to implement and enforce rehabilitation codes.<sup>9</sup>

The potential spread of rehabilitation codes raises several important legal and policy issues. The first is the effect of regulation on our economy and physical landscape.<sup>10</sup> I argue that rehabilitation codes have an overwhelmingly positive economic and architectural impact. A second broad theme is the tension between rules and standards in our building regulations. Traditional codes usually impose rules, specifying what must be done, while rehabilitation codes impose standards, requiring that outcome meet certain performance criteria. By using standards instead of rules, rehabilitation codes provide builders and owners with flexibility in addressing the many varied construction issues presented by our diverse older building stock. Finally, this Note explores the relationship between the federal government and the states in drafting and enacting building regulations. I argue that rehabilitation codes are best adopted at the state level, because—practically speaking—state governments are best situated to accommodate geographic variety, administer the codes, and adapt to changing needs.

## **I. TRADITIONAL BUILDING CODES FAIL TO ADDRESS REHABILITATION**

Critics have lobbed various charges at traditional codes, calling them slow to adapt, costly, insensitive to urban needs, and discouraging of innovation. But the biggest failure of traditional codes is that they do not satisfactorily address existing buildings, which far outnumber new structures. This Part analyzes how traditional codes stifle four positive effects of rehabilitation:

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9. See *infra* text accompanying notes 143-145.

10. Many types of laws determine what and how we build: building codes, design review guidelines, zoning and planning laws, subdivision controls, historic preservation ordinances, sign and billboard controls, satellite dish and cell tower regulations, view protection and open space laws, and handicapped access laws. See Jerold S. Kayden, *Understanding the "Code" of Codes*, PERSPECTA, 2004, at insert.

preserving a historical record, revitalizing central cities, stimulating economic activity, and encouraging affordable housing.

### *A. A Historical Record*

Why encourage rehabilitation? A starting point may be the sentimental argument that old buildings, as physical manifestations of a shared history, are public goods worth saving. This argument posits that, despite its potentially higher short-run costs, rehabilitation can have lasting community benefits. Older buildings frequently demonstrate public good characteristics. Their exteriors often define shared spaces, meaning that their owners cannot usually exclude others from experiencing them; they are nonrivalrous in consumption, that is, they can be experienced by multiple people at the same time; and they can have positive external effects, such as improving a neighborhood's aesthetic character.<sup>11</sup>

Motivations for protecting older buildings also go further than the public good theory: Some people are simply nostalgic, others have a feeling of duty to future generations, and still others dislike new construction, for either its homogeneity or its ugliness.<sup>12</sup> Jane Jacobs famously expressed all of these motivations when she wrote about her beloved Greenwich Village and its diverse older buildings, which she saw threatened by urban renewal and modern development.<sup>13</sup> More recently, a number of scholars have lamented the poor quality (or lack) of contemporary planning.

Whatever their motivations, growing numbers of Americans are aware of the importance of our architectural history and are looking carefully at rehabilitation strategies. One of the most popular contemporary architectural movements, New Urbanism, preaches both the rehabilitation and imitation of the dense urban cores of the past.<sup>14</sup> The movement's leaders have argued that

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11. See Michael Hutter, *Economic Perspectives on Cultural Heritage: An Introduction*, in *ECONOMIC PERSPECTIVES ON CULTURAL HERITAGE* 3, 5 (Michael Hutter & Ilde Rizzo eds., 1997).

12. See ALEXANDER GARVIN, *THE AMERICAN CITY: WHAT WORKS, WHAT DOESN'T* 470 (2d ed. 2002).

13. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

14. See CONG. FOR THE NEW URBANISM, *CHARTER OF THE NEW URBANISM* (2001), available at [http://www.cnu.org/cnu\\_reports/Charter.pdf](http://www.cnu.org/cnu_reports/Charter.pdf) ("We stand for the restoration of existing urban centers and towns . . . and the preservation of our built legacy."). The Congress for the New Urbanism, which serves as the primary organizing body of the movement, has listed rehabilitation codes as among the types of building regulations that support New Urbanism. See CONG. FOR THE NEW URBANISM, *NEW URBANIST CODE LIST* (2001), available at <http://www.cnu.org/resources/index.cfm> (follow "CNU Reports" hyperlink; then follow "New Urbanist Codes List" hyperlink).



"[t]ax and mortgage policies must be revamped to encourage renovation as much as new construction."<sup>15</sup> In addition, there are a record 79,000 properties on the National Register of Historic Places (a voluntary register of historically significant structures),<sup>16</sup> and the National Trust for Historic Preservation, the nation's largest advocacy group focusing solely on the reuse and preservation of older structures, boasts several hundred thousand members.<sup>17</sup>

Traditional building codes do not generally reflect this growing awareness of the benefits of rehabilitation, and only rarely do they recognize any legal difference between new and existing construction.<sup>18</sup> But this is not merely benign neglect: Traditional codes can actively hurt existing buildings by taking a prescriptive approach to rulemaking, specifying procedures and materials that must be used rather than taking a flexible or historically sensitive approach.<sup>19</sup> As many renovators have learned, trying to fit older buildings into a modern set of prescriptive rules can make rehabilitation difficult and costly. Modern rules may prohibit the use of certain historically popular materials or may require substantial alterations that detract from a building's aesthetic identity. Moreover, the rigidity of prescriptive rules can lead to uniform, "cookie-cutter," or even outright unattractive results. Finding a way to protect our diverse supply of older buildings from the harms of traditional coding should be an important goal.

### *B. Central Cities*

Rehabilitation can have more than just sentimental benefits. It can also help improve central cities, which have the highest concentration of older buildings.<sup>20</sup> More and more Americans are beginning to view central cities as

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15. ANDRES DUANY ET AL., *SUBURBAN NATION* 235 (2000).

16. Nat'l Park Serv., About the National Register of Historic Places, <http://www.cr.nps.gov/nr/about.htm> (last visited Jan. 31, 2006).

17. See Nat'l Trust for Historic Pres., About the National Trust, [http://www.nationaltrust.org/about\\_the\\_trust](http://www.nationaltrust.org/about_the_trust) (last visited Jan. 31, 2006) (claiming 270,000 members).

18. See *infra* Section II.A.

19. See generally Greg C. Foliente, *Developments in Performance-Based Building Codes and Standards*, FOREST PRODUCTS J., July/Aug. 2000, at 12, 12 (explaining that, compared with prescriptive standards, a performance standard approach would be more flexible in its requirements that buildings meet a certain level of functionality).

20. See, e.g., Alexander Garvin, *Regulating in the Public Interest*, PERSPECTA, 2004, at insert ("The additional expenditure associated with bringing buildings into compliance with the most recent codes often discourages investment in older structures and hinders reinvestment throughout our cities.").

attractive alternatives to the sprawling suburbs.<sup>21</sup> Despite this recent wave of interest, however, cities are suffering from longstanding fiscal and social problems, including poor infrastructure, high unemployment, high tax burdens, broken educational systems, and impoverished governments.<sup>22</sup> The failure of codes to encourage rehabilitation exacerbates these problems.

Traditional building codes do little, for example, to encourage the rehabilitation of vacant and abandoned structures. The Census Bureau's 2003 *American Housing Survey for the United States* reported that eleven percent of all housing structures were vacant—including nearly four million central city structures.<sup>23</sup> City by city, the numbers of vacant houses can be staggering.<sup>24</sup> One recent study, surveying seventy metropolitan areas with populations of 100,000 or more, found that on average fifteen percent of urban land (both with and without buildings) sat empty.<sup>25</sup> Vacant and abandoned buildings have many negative effects: They reduce potential tax revenues,<sup>26</sup> encourage arson and accidental fires,<sup>27</sup> lower values of surrounding property, harm neighborhood aesthetics, imperil public safety and health, and promote

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21. Kenneth Jackson has offered a good description of American suburbia, outlining the five characteristics that suburban subdivisions tend to share: peripheral location; relatively low density; architectural similarity; easy availability and reduced suggestion of wealth; and economic and racial homogeneity. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 238-41 (1985); see also U.S. DEP'T OF HOUS. & URBAN DEV., *THE STATE OF THE CITIES* 1999, at 11-12 (1999), available at <http://www.huduser.org/publications/pdf/soc99.pdf> (noting that two-thirds of central cities increased in population between 1980 and 1996).
  22. See Roy Bahl, *Metropolitan Fiscal Disparities*, 1 *CITYSCAPE* 293, 293-302 (1994).
  23. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *AMERICAN HOUSING SURVEY: 2003*, at xi, 1 (2004), available at <http://www.census.gov/prod/2004pubs/H150-03.pdf>.
  24. See JOHN KROMER, *VACANT-PROPERTY POLICY AND PRACTICE: BALTIMORE AND PHILADELPHIA* 4, 6 (2002), available at <http://www.brookings.org/es/urban/publications/kromervacant.pdf>. Baltimore, which lost 11.5% of its population between 1990 and 2000, has 14,000 abandoned homes, while Philadelphia, which lost 4.3% of its population, has 26,000.
  25. See MICHAEL A. PAGANO & ANN O'M. BOWMAN, *VACANT LAND IN CITIES: AN URBAN RESOURCE* 1 (2000), available at <http://www.brookings.org/es/urban/pagano/paganofinal.pdf>. Nonresidential structures no doubt make up a substantial portion of this figure.
  26. As the American Iron and Steel Institute pointed out, abandoned and depreciated buildings negatively "affect[] tax receipts and municipal expenditures." AM. IRON & STEEL INST., *FIRE PROTECTION THROUGH MODERN BUILDING CODES* 67 (1961).
  27. See Interfire, *The National Vacant/Abandoned Building Fire Problem*, <http://www.interfire.org/pdf/ArsonFacts%202001.pdf> (last visited Jan. 31, 2006) (noting that between 1993 and 1997, an average of 12,200 fires burned in abandoned or vacant buildings, resulting in ten civilian deaths and seventy-three million dollars worth of property damage per year).

criminal activity.<sup>28</sup> Despite these effects, property owners often conclude that the cost of retrofitting structures to meet current codes is too high and allow buildings to deteriorate further.<sup>29</sup> While some of these buildings are beyond repair and must be demolished, many can – and should – be rehabilitated.<sup>30</sup>

Traditional codes also hurt central cities by giving suburban areas a competitive advantage. A federal commission investigating barriers to affordable housing estimated that building codes make rehabilitated projects in urban jurisdictions twenty-five percent more expensive than identical new construction projects in adjacent suburbs.<sup>31</sup> As New Urbanist Andres Duany has argued, “[w]ithout [predictable] codes, older urban areas tend to suffer from disinvestment, as the market seeks stable environments. The competing private codes of the homeowners associations, the guidelines of office parks, and the rules of shopping centers create predictable outcomes that lure investment away from existing cities and towns.”<sup>32</sup>

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28. See Mark Setterfield, *Abandoned Buildings: Models for Legislative & Enforcement Reform* (1997) (unpublished manuscript), available at [http://www.trincoll.edu/depts/tcn/Research\\_Reports/resrch23.htm](http://www.trincoll.edu/depts/tcn/Research_Reports/resrch23.htm).
  29. See DANIELLE ARIGONI, SMART GROWTH NETWORK SUBGROUP ON AFFORDABLE HOUS., *AFFORDABLE HOUSING AND SMART GROWTH: MAKING THE CONNECTION* 24 (2001), available at [http://www.epa.gov/smartgrowth/pdf/epa\\_ah\\_sg.pdf](http://www.epa.gov/smartgrowth/pdf/epa_ah_sg.pdf).
  30. See WILLIAM W. NASH, *RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES* 163-64 (1959) (estimating that 400,000 units might be saved from destruction or dilapidation each year if rehabilitation were better encouraged).
  31. See ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., “NOT IN MY BACK YARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING 6 (1991); U.S. DEP’T OF HOUS. & URBAN DEV., “WHY NOT IN OUR COMMUNITY?”: REMOVING BARRIERS TO AFFORDABLE HOUSING 5 (2005), available at <http://www.huduser.org/Publications/pdf/wnioc.pdf> (revisiting the 1991 report and stating that problems with regulations like building codes that “were barriers then remain barriers today”).
  32. Andres Duany, *Notes Toward a Reason To Code*, PERSPECTA, 2004, at insert; see also CTR. FOR POLICY ALTERNATIVES, *PROGRESSIVE SOLUTIONS BUILT ON AMERICAN VALUES: 2004 PROGRESSIVE AGENDA FOR THE STATES* 308-10 (2003), available at <http://cfpa.org/publications/agenda/2004/2004agenda.pdf> (arguing that “inflexible building codes tend to encourage sprawl projects on undeveloped land over revitalization projects in cities and towns”). But see Raymond J. Burby et al., *Building Code Enforcement Burdens and Central City Decline*, 66 J. AM. PLAN. ASS’N 143, 152 (2000) (arguing that “central cities can influence the business climate for development through the different building code enforcement choices they make”). Professor Michael Porter, however, has noted that building codes are only part of the problem, arguing that investment in cities is deterred by “the costs and delays associated with logistics, negotiations with community groups, and strict urban regulations: restrictive zoning, architectural codes, permits, inspections, and government-required union contracts and minority set-asides.” Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May-June 1995, at 55, 63.

### C. *The Economy*

Rehabilitation is a powerful economic force. Its impact is difficult to quantify, however, since rehabilitation often occurs without building permits and since rehabilitation statistics are calculated in many different ways. The best estimates suggest that rehabilitation accounts for one-fifth of all construction<sup>33</sup> and about two percent of the nation's total economic activity.<sup>34</sup> One survey collecting data between 1975 and 2003 indicates that over five times as many existing homes are sold each year as new homes.<sup>35</sup>

Some may argue that rehabilitation does not always make a greater economic contribution than new construction when measured on the scale of single buildings or projects.<sup>36</sup> While it is true that rehabilitation is not a viable option in every situation, it is also true that many buildings are more efficiently rehabilitated than torn down and replaced. Moreover, rehabilitation projects often stimulate indirect economic benefits, such as investment by owners of neighboring properties, community groups, and commercial investors.<sup>37</sup> While relevant statistics are difficult to find, one could look at the effects of the Main Street Program, run by the National Trust for Historic Preservation in more than 1700 communities. It aims to revitalize communities through the rehabilitation and adaptive reuse of older structures. The National Trust estimates that, by facilitating 107,000 building rehabilitations, its Main Street Program has encouraged public and private investment of \$23.3 billion and

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33. See David Listokin et al., *The Contributions of Historic Preservation to Housing and Economic Development*, 9 HOUS. POL'Y DEBATE 431, 440 (1998) (estimating that rehabilitation makes up forty percent of nonresidential activity and ten percent of residential construction).

34. See DAVID LISTOKIN & BARBARA LISTOKIN, CTR. FOR URBAN POLICY RESEARCH, BARRIERS TO THE REHABILITATION OF AFFORDABLE HOUSING 1 (2001).

35. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING: 2004, at 32-33 tbl.A2 (2004), available at <http://www.jchs.harvard.edu/publications/markets/son2004.pdf>; see also BARBARA T. WILLIAMS, U.S. DEP'T OF COMMERCE, THESE OLD HOUSES: 2001, at 23-24 tbl.A1 (2004), available at <http://www.census.gov/prod/2004pubs/h121-04-1.pdf> (noting that of 119,117,000 housing units in the United States, 43,948,000 (or 36.9%) were built before 1960, and 30,169,000 (or 25.3%), were built before 1950).

36. As watching even one episode of the television program *This Old House* reveals, rehabilitation typically requires more skilled labor and local knowledge, but fewer raw materials, than does new construction. Comparative costs thus depend on, among other things, the extent of the project, the cost of materials and labor, the experience of the builder, and the relevant regulations.

37. See ARIGONI, *supra* note 29, at 24.

created 308,000 new jobs.<sup>38</sup> One prominent planner has reported that the benefits of investment in older buildings—including “economic benefits from the tourists it attracts, social benefits from a more heterogeneous population seeking a broader range of living environments, and cultural benefits from its enhanced setting of artistic activity”—offset the costs.<sup>39</sup>

Yet the Census Bureau’s 2003 *American Housing Survey* demonstrates that rehabilitation is not being done on many of the homes that need it. The Census Bureau estimates that two percent of housing units lack some or all plumbing facilities; three percent have loose steps; three percent have major foundation problems; five percent lack complete kitchen facilities; five-and-a-half percent have boarded or broken windows; and nearly nine percent have major roof problems (such as holes or sags).<sup>40</sup> Overall, one in every fifty households lives in housing that is “seriously substandard.”<sup>41</sup>

The deterrents inherent in traditional coding explain why the rehabilitation sector is not expanding. Many buildings remain in disrepair because traditional codes make rehabilitation overly expensive. Studies have tried to measure the cost of traditional codes in two ways: first, by measuring the actual impact of codes on the cost of construction, and second, by exploring builders’ perceptions of the additional costs that codes create. Estimates of this impact on new construction have ranged from one percent to two hundred percent, and empirical research is thin.<sup>42</sup> “Much of [the data on the cost of codes] is so old as to be useful only for historic interest,” as Michael Schill recently pointed out, “[or is] based on anecdotal accounts or poorly specified models.”<sup>43</sup> The widely divergent literature roundly illustrates this point.<sup>44</sup>

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38. See NAT’L TRUST FOR HISTORIC PRES., ANNUAL REPORT 2004, at 5 (2005), available at [http://www.nationaltrust.org/about\\_the\\_trust/2004\\_Annual\\_Report\\_NTHP.pdf](http://www.nationaltrust.org/about_the_trust/2004_Annual_Report_NTHP.pdf).

39. GARVIN, *supra* note 12, at 470.

40. See U.S. CENSUS BUREAU, *supra* note 23, at 3, 5 tbls.1A-2 & 1A-4.

41. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 35, at 25.

42. See David Listokin & David B. Hattis, *Building Codes and Housing*, 8 CITYSCAPE 21, 21 (2005).

43. Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE 5, 9 (2005).

44. See Richard F. Muth & Elliot Wetzler, *The Effect of Constraints on House Costs*, 3 J. URB. ECON. 57, 64 (1976) (positing that local codes (as opposed to model codes) added seventeen cents per square foot, or less than two percent of the average total cost, to single-family homes built in 1966). Compare NAT’L COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 262 (1969) (estimating that in 1968, excessive code requirements cost a total of \$1838 for a 1000-square-foot family unit), with Kristina Ford, *Afterword—A Guide to Cost Conversion*, in SEIDEL, *supra* note 3, at 330 (stating that “[t]he total excessive cost of these building code requirements is \$949” for a three-bedroom house). But see Eli M. Noam, *The Interaction of Building Codes and Housing Prices*, 10 AM. REAL EST. & URB. ECON. ASS’N J. 394,

Though the statistics are difficult to pin down, a significant number of builders believe that complying with building regulations costs too much.<sup>45</sup> In a 1998 National Association of Home Builders study, which surveyed builders in forty-two metropolitan areas, builders attributed ten percent of construction costs to government regulations, including traditional building codes.<sup>46</sup> Four years later in a separate study, fifty-two percent of developers claimed that codes increased the cost of a unit by more than five percent.<sup>47</sup> Whatever the exact figure, it remains clear that the high cost of construction and builders' frustration with codes dampens investment in rehabilitation.<sup>48</sup>

#### *D. Affordable Housing*

Rehabilitation can also alleviate the affordable housing crisis in the United States. Currently, nearly one-third of households spend thirty percent or more of their income on housing, and thirteen percent spend fifty percent or more.<sup>49</sup> Rehabilitating existing structures could augment the supply of affordable housing, since older structures tend to be less expensive than new ones.<sup>50</sup> But traditional codes thwart this possibility, both because their applicability to older structures is often unpredictable and because they are often too complex

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395 (1983) (criticizing the methodology of Muth and Wetzler, especially their presumption that local codes are more restrictive than national model codes).

45. See CHARLES G. FIELD & STEVEN R. RIVKIN, *THE BUILDING CODE BURDEN* 72 (1975) (reporting that the home manufacturers interviewed by the authors perceived codes to be "a national disaster"); SEIDEL, *supra* note 3, at 28 (noting that of the 2600 builder respondents, more chose building regulations as a problem than chose the unavailability of financing, lack of suitable land, the cost of materials shortages, or the cost of labor shortages); Eran Ben-Joseph, *Subdivision Regulations: Practices & Attitudes* 4 (Lincoln Inst. of Land Pol'y Working Paper, 2003), available at <http://www.lincolninst.edu/pubs/pub-detail.asp?id=846> (noting that, in a 1964 survey of builders, only 6.1% thought building codes were problematic, increasing to 78% in 1976).
46. Schill, *supra* note 43, at 13.
47. See Ben-Joseph, *supra* note 45, at 10 (replicating the methods of the Seidel study in 1976, in which only thirty-seven percent of developers claimed that building codes increased unit cost more than five percent).
48. See NASH, *supra* note 30, at 163 (reporting that, in 1957 prices, codes deterred rehabilitation by increasing the cost of construction by \$750-\$1000 for low-rent units being rehabilitated and \$7000-\$10,000 for upper-income units).
49. See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 35, at 4. The effects of such a shortage can be dramatic, as an expensive housing supply can make cities lose their competitive appeal. See DAVID E. DOWALL, *THE SUBURBAN SQUEEZE: LAND CONVERSION AND REGULATION IN THE SAN FRANCISCO BAY AREA* 7-9 (1984).
50. See WILLIAMS, *supra* note 35, at 11 (noting that housing price medians were \$98,793 for structures built before 1920 but \$154,223 for structures built between 1990 and 2001).

for small-time renovators to understand.<sup>51</sup> Traditional codes often make it difficult for potential rehabilitators to estimate a project's cost at the outset, thereby decreasing or jeopardizing the margin of return on already risky affordable housing rehabilitation projects.<sup>52</sup> By discouraging investment in older buildings, traditional codes tend to favor new construction or even manufactured housing—both inefficient solutions to the affordable housing shortage.<sup>53</sup>

Rehabilitation-promoting policies offer a compelling alternative solution to this problem.<sup>54</sup> Many of those most in need of affordable housing already live in older buildings; to take one indicator, about sixty percent of buildings within historic districts are in census tracts with a poverty level of twenty percent or more.<sup>55</sup> As such, the rehabilitation code solution matches supply with demand for affordable housing.

There is a risk that rehabilitation may inflate housing prices to such a degree that certain populations, like lower-income residents or small businesses, will be displaced.<sup>56</sup> However, rehabilitation can be targeted in ways

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51. See, e.g., ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., *supra* note 31, at 3-1; NASH, *supra* note 30, at 187 (noting governments' failure "to make clear-cut decisions as to how, when, and where to use rehabilitation in their local programs"); Peter J. May, *Regulatory Implementation: Examining Barriers from Regulatory Processes*, 8 CITYSCAPE 209, 209 (2005). As one commentator remarked: "If attempts [through building codes] to make all housing safe, sanitary, efficient and convenient have significantly contributed to limiting the availability of housing to people who need it, perhaps society needs to rethink the codes." Eric Damian Kelly, *Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?*, 29 J. MARSHALL L. REV. 349, 349 (1996).
  52. See LISTOKIN & LISTOKIN, *supra* note 34, at 5 ("Delays, excessive codes, rising property taxes, and other issues would be less daunting if the margins in doing affordable-housing renovation were not as critical as they are.").
  53. See Donovan D. Rypkema, *Historic Preservation and Affordable Housing: The Missed Connection*, F.J., Spring 2003, at 4, 8, 16-17.
  54. *Id.* at 16-17.
  55. See Richard Moe, President, Nat'l Trust for Historic Pres., *Using Preservation To Solve the Affordable Housing Crisis in America*, Address Before the Annual U.S. Conference of Mayors Meeting in Madison, Wisc. (June 17, 2002), available at [http://www.nationaltrust.org/news/docs/20020617\\_moe\\_mayors.html](http://www.nationaltrust.org/news/docs/20020617_moe_mayors.html).
  56. See Peter Werwath, *Comment on David Listokin, Barbara Listokin, and Michael Lahr's "The Contributions of Historic Preservation to Housing and Economic Development,"* 9 HOUSING POL'Y DEBATE 487, 487 (1998) (criticizing other analysts' failure to take displacement effects into account). This Note does not use the phrase "gentrification" to describe this phenomenon, since, as Donovan Rypkema has noted, that term has come to be "so loaded with economic, social, cultural, and often racial overtones that rational, reasoned discussion is often simply not possible." Donovan D. Rypkema, *The Oversimplification of Gentrification*, F.J., Summer 2004, at 26, 27.

that increase the number of affordable housing units—by focusing on the conversion of abandoned buildings, for example. At any rate, displacement must be balanced against the many positive effects of gentrification through rehabilitation: reinvestment, increased levels of homeownership, improved public services, enhanced tax revenues, neighborhood jobs, and economic integration.<sup>57</sup>

## II. THE EMERGENCE OF REHABILITATION CODES

Despite the well-understood benefits of rehabilitation, getting the issue on the nation's social and political agenda has been a slow process. The first attempts to address rehabilitation—both through model codes and through federal and state laws—had minimal impact. More effective has been the series of state and municipal code adoptions that were specifically dedicated to rehabilitation. New Jersey pioneered the rehabilitation code movement, enacting its comprehensive, mandatory Rehabilitation Subcode in 1997. Maryland, Pennsylvania, Michigan, Florida, Rhode Island, and North Carolina, and cities in Kansas, Missouri, Arizona, Washington, and Delaware have followed suit, at least to some extent, over a period of several years.<sup>58</sup> Also in 1997, the Federal Department of Housing and Urban Development (HUD) developed a model code, the Nationally Applicable Recommended Rehabilitation Provisions, based on New Jersey's Subcode. Finally, in 2000 the International Code Council—a group created in 1994 to develop a single set of comprehensive, coordinated national model construction codes—adopted its own version of a model rehabilitation code, the International Existing Building Code.

This Part analyzes the enactment of three varieties of rehabilitation codes in three different states: New Jersey, which enacted its code on a mandatory statewide basis; Maryland, which adopted the federal government's model code; and Pennsylvania, which has followed the International Existing Building Code. Of these, the New Jersey Subcode remains the most successful, in large part because it applies statewide and is administered in a coherent manner; Maryland's code is merely a model code, while Pennsylvania has experienced many problems with implementation and enforcement. Because

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57. See, e.g., Rypkema, *supra* note 56, at 27; see also U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 21, at ix-x (recognizing that homeownership is an important component of strengthening central cities and describing some of the efforts of the federal government to encourage homeownership).

58. Indeed, although the mid-Atlantic states (on which Part II focuses) have been pioneers, other states have not ignored rehabilitation codes.



little quantitative research has been done to study the effects of these codes, this Part relies largely on qualitative findings—descriptions, stories, implications, and comparisons—to justify its conclusions.<sup>59</sup>

### A. Attempts To Address Rehabilitation Before Rehabilitation Codes

In the mid-1980s, two code organizations adopted model codes that specifically addressed the rehabilitation of existing buildings,<sup>60</sup> but these model codes were all but ignored.<sup>61</sup> Of more significance, in terms of their impact on rehabilitation, were the provisions in the older, generally applicable model codes that addressed existing structures. These provisions primarily dealt with existing structures with one (or both) of two rules: the “25-50% rule” and the “change-of-occupancy rule.”<sup>62</sup> Each of these rules negatively affected (and continue to affect, where in force) rehabilitation projects because they are simultaneously confusing and difficult to apply uniformly.

Though there are many variations of the “25-50% rule,” the rule essentially states that “[i]f the total estimated cost of the proposed project over some stated period of time exceeds 50 percent of the estimated cost to replace the existing building, the end result must be a building that is in complete compliance with the building code.”<sup>63</sup> The level of required compliance decreases if the cost of the project is between twenty-five and fifty percent of

59. Even those who have called for quantitative analysis recognize that it is inherently difficult. Compare Listokin & Hattis, *supra* note 42, at 54 (calling for such studies), with Telephone Interview with David Listokin, Co-Dir., Ctr. for Urban Policy Research, Rutgers Univ., in New Brunswick, N.J. (Sept. 30, 2005) (suggesting that no analytical model can accurately isolate the effect of rehabilitation codes as long as the volume of rehabilitation activity remains difficult to assess).

60. The Southern Building Code Congress International (SBCCI) published its Standard Existing Building Code in 1988, and the International Conference of Building Officials (ICBO) published its Uniform Code for Building Conservation in 1985. Note that the International Code Council (ICC) has since replaced not only these two groups, but also the third major coding organization that was active in the 1980s, Building Officials and Code Administrators International.

61. See U.S. DEP'T OF HOUS. & URBAN DEV., THE STATUS OF BUILDING REGULATIONS FOR HOUSING REHABILITATION: A NATIONAL SYMPOSIUM 6 (1995), available at [http://www.toolbase.org/Docs/MainNav/Remodeling/3058\\_building\\_reg\\_rehab.pdf](http://www.toolbase.org/Docs/MainNav/Remodeling/3058_building_reg_rehab.pdf) (noting that for the SBCCI code, for example, only “[a]bout 200 copies were ordered in the past 12 months. No questions regarding code interpretation have been received at SBCCI headquarters.”); *id.* at 8 (reporting that the ICBO code had been adopted in “Ogden, Utah, a county in Nevada, and by the state of Washington for historic structures”).

62. See LISTOKIN & LISTOKIN, *supra* note 34, at 83 (addressing the history of both of these rules).

63. *Id.* at 187.

the replacement cost, and decreases further if the cost of the project falls below twenty-five percent. All of the early, generally applicable model codes adopted this rule but abandoned it around 1980.<sup>64</sup> This rule was problematic for rehabilitation projects for two main reasons. First, estimates of the true “replacement cost” of a building were difficult to determine and were calculated differently across jurisdictions, rendering partial estimates of such cost inaccurate and inconsistent. Second, renovations exceeding fifty percent of the cost of the building triggered complete compliance with new construction codes significantly increased project costs, thereby deterring much-needed rehabilitation.

The change-of-occupancy rule, which mandates that any building that has changed in use or occupancy comply with new construction standards (even if such a change resulted in a less hazardous use or lower occupancy), was also used by all of the older model code groups.<sup>65</sup> Each code was drafted slightly differently, but all allowed for flexibility if a building official certified that renovations met the intent of the new construction code or if the new use was less hazardous than the existing use. The change-of-occupancy rule created problems for rehabilitation primarily because it gave too much discretion to code officials and consequently was unevenly enforced. Moreover, because no guidelines were set out in advance, renovators did not know how much money to set aside for code compliance and could not accurately assess their financial risks.

Modifications to the change-of-occupancy rule did not improve matters. Beginning in 1980, HUD published a series of eleven volumes recommending that the model codes better address rehabilitation.<sup>66</sup> HUD urged the model code authorities to add categories of construction called “alteration” and “repair” alongside the existing “Change of Occupancy” category. If a project was classified as an alteration, building officials would be given flexibility to decide to what extent the codes would apply. A later survey of building officials, however, demonstrated that HUD’s recommendations did not help

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64. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 61, at 5.

65. See LISTOKIN & LISTOKIN, *supra* note 34, at 190; *see also supra* note 60 (listing the relevant groups).

66. See, e.g., 1 DAVID HATTIS, U.S. DEP’T OF HOUS. & URBAN DEV., REHABILITATION GUIDELINES 1980: GUIDELINE FOR SETTING AND ADOPTING STANDARDS FOR BUILDING REHABILITATION (1980). Congress requested that HUD develop such guidelines “for the voluntary adoption by States and communities to be used in conjunction with existing building codes by State and local officials in the inspection and approval of rehabilitated properties.” Amendments to the Housing and Community Development Amendments of 1970, 12 U.S.C.A. § 17012-10(a)(1) (2001).

much in removing regulatory barriers to affordable rehabilitation because these recommendations were used by less than four percent of code officials.<sup>67</sup>

In addition to its attempts to influence the model codes through the HUD guidelines, the federal government also passed guidelines for the rehabilitation of designated historic structures.<sup>68</sup> The 1966 National Historic Preservation Act enlarged the scope of preservation policy and provided that the Department of the Interior can designate significant structures or districts as historic.<sup>69</sup> Historic structures and contributing structures within a historic district are placed on a national register and various protections and obligations then apply.<sup>70</sup> The Act requires that for the structure to remain on the register and maintain eligibility for a federal rehabilitation tax credit, any rehabilitation project must be "certified" by the Secretary of the Interior. The guidelines for certifying a rehabilitation project, first published in 1977 and revised in 1990, sets out broad criteria, including that the structure may only be minimally changed and that the historic character must be preserved.<sup>71</sup> These guidelines, however, are voluntary and apply only to owners of federally designated historic properties, and as such are not a mandatory or generally applicable building code.

Finally, various state laws, many of which are still in place, have also attempted to provide standards for rehabilitation, but have failed to fill the gaps in addressing rehabilitation more broadly. Some laws have focused only on designated historic structures and not on older buildings generally. For example, several states have allowed, at code officials' discretion, exemptions from building code requirements for structures designated as historic by a local, state, or federal authority.<sup>72</sup> Other states, like Virginia, have included in

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67. See HOUS. RESEARCH & DEV. ET AL., NATIONAL SURVEY OF REHABILITATION ENFORCEMENT PRACTICES 38-39 (1998), *available at* <http://www.huduser.org/publications/doc/rehabsurv.doc> (reporting that the majority of code officials (62.4%) were unaware of the guidelines and that "[a]nother 31.7 percent reported that they were aware of the Guidelines, but did not use them. Five code administrators (2.3%) reported they had used it, but that they did not find it useful. Only eight individuals (3.6%) reported that they had used it and that they found it useful.").

68. Note that the so-called Rehabilitation Act applies not to architecture but to equal employment opportunities for the disabled. See Rehabilitation Act of 1973, 29 U.S.C. § 791 (2000).

69. See National Historic Preservation Act of 1966, 16 U.S.C. § 470 (2000).

70. States and some cities have similar registers, which may have more or less restrictive criteria for inclusion.

71. See 36 C.F.R. § 67.7 (2005).

72. See MELVYN GREEN & PATRICK W. COOKE, U.S. DEP'T OF COMMERCE, NATIONAL BUREAU OF STANDARDS TECHNICAL NOTES 918, SURVEY OF BUILDING CODE PROVISIONS FOR HISTORIC

their building codes special regulations for designated historic structures.<sup>73</sup> Yet very few states have drafted comprehensive laws that deal with both historic and nonhistoric buildings.

One example of a state that has pursued this comprehensive approach is Massachusetts, which has inserted a section entitled “Repair, Alteration, Addition, and Change of Use of Existing Buildings” in its statewide building code in order to free some rehabilitation projects from complying with the traditional building code.<sup>74</sup> The Massachusetts provision applies to existing buildings that have been legally occupied or used for more than five years. Among other provisions, it establishes a “hazard index,” giving structures a hazard rating based on their use;<sup>75</sup> changes that would increase a building’s hazard rating have to abide by higher code requirements.

A review of these approaches clarifies the large statutory gaps that rehabilitation codes should fill: Previous approaches—where they existed at all—did not go beyond the meager provisions in the model codes, and only rarely provided for structures that were not designated as historic.

#### *B. New Jersey’s Mandatory Statewide Approach*

Before New Jersey enacted its pioneering Subcode, the state followed the “25-50% rule” described above—a rule that unintentionally thwarted rehabilitation projects. By 1995, the tremendous obstacles to upgrading older structures created by this rule had become an issue of statewide concern. That year, several New Jersey researchers and code officials joined their counterparts from other states, as well as model code organization representatives and national fire safety groups, at a symposium organized by HUD.<sup>76</sup> At the symposium, the New Jersey group expressed an interest in developing a new rehabilitation code that combined the strengths of prior approaches.<sup>77</sup> A broad coalition, led by the New Jersey Department of Community Affairs and the

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STRUCTURES 19 (1976) (noting that such laws were in place in Virginia, Oregon, Indiana, New York, and North Carolina, and were being proposed in New Mexico, Connecticut, and Rhode Island).

73. See Milton L. Grigg, *Preservation with the Virginia Statewide Building Code: The Architect’s View*, in PRESERVATION & BUILDING CODES 47, 47 (Jennie B. Bull ed., 1975).

74. See 780 MASS. CODE REGS. 3400.0-3409.3.12 (1998), available at [http://www.mass.gov/bbrs/780CMR\\_Ch34.pdf](http://www.mass.gov/bbrs/780CMR_Ch34.pdf).

75. See *id.* at 3403.1

76. See U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 61, at iii.

77. *Id.* at 19-21.

Center for Policy Research at Rutgers University, began meeting in 1996 to draft this new code.

The resulting New Jersey Subcode recognizes six kinds of projects involving existing buildings: repair, renovation, alteration, reconstruction, change of use, and addition.<sup>78</sup> The term "rehabilitation" in the Subcode applies only to the first four kinds of projects (listed here in the order of their impact on building integrity), with a repair requiring the fewest rules and a reconstruction requiring many more rules.<sup>79</sup> The rules that apply to a change of use depend on the level of hazard or additional safety requirements imposed by the change.<sup>80</sup> As in the Massachusetts system, the greater the increase in the hazard index created by the Subcode, the more requirements are imposed, such as those governing means of egress, height and area, exposure of exterior walls, fire suppression, and structural loads.<sup>81</sup> An addition, meanwhile, must comply with applicable conditions for new construction.<sup>82</sup> The Subcode also applies to buildings designated as historic by the state or federal government, although variances are granted if the owner demonstrates that compliance with the Subcode would threaten the historic character of her building.<sup>83</sup>

By establishing clear and reasonable guidelines for rehabilitation projects, the Subcode has met the dual goals of its working group: predictability for builders and proportionality in its application. As a local journalist observed, experts agree that a major benefit of the Subcode is that it is applied uniformly: "Local construction officials had too much discretion under the old code, they say, whereas the new rules bring long overdue standardization, simplification, and more reliable safety enhancements to the job of rehab."<sup>84</sup> Another strength is that the Subcode eliminates arbitrary requirements that make no material difference to a building's structural integrity or safety. For example, the Subcode no longer requires that stairs and hallways be forty-eight inches wide, that doors be thirty-two inches wide, or that stairwells be vented instead of fitted with sprinklers.<sup>85</sup>

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78. See N.J. ADMIN. CODE § 5:23-6.2(b)(2) (2005).

79. See *id.* § 5:23-6.3.

80. See *id.* § 5:23-6.31(a). Note that rehabilitation of buildings less than one year old need not comply with general requirements for new construction. *Id.* § 5:23-6.31(a)(1)(i).

81. See *id.* § 5:23-6.31 (describing the change of use evaluation process); *id.* §§ 5:23-6.20 to -30 (detailing the code requirements for various subcategories of use).

82. See *id.* § 5:23-6.32(a).

83. See *id.* § 5:23-6.33(a)-(b).

84. Ben Forest, *New Jersey Revs Up Its Rehabs*, PLANNING, Aug. 1999, at 10, 12.

85. See Richard Fischer, *Rehabilitation Subcode Success*, PUB. MGMT., Mar. 2001, at 12, 15-16.

There are many reasons to believe that the Subcode has had a significant positive effect on rehabilitation, especially in city centers where New Jersey's older buildings cluster.<sup>86</sup> The New Jersey Department of Community Affairs publishes annual reports about the building permits granted by its 566 municipalities. In its 1998 *Construction Reporter*, the state reported a ten percent increase in construction overall and a substantial increase in rehabilitation work in cities.<sup>87</sup> Rehabilitation work in Jersey City grew by 83.5%, in Newark by 59.2%, and in Trenton by 40.1%—compared with a modest 7.7% increase in statewide rehabilitation between 1997 and 1998.<sup>88</sup> The next year, the state reported that work on existing buildings in New Jersey's sixteen largest cities rose from \$363.3 million in 1997 to \$510.8 million in 1998 to \$590.4 million in 1999—a two-year increase of 62.5%.<sup>89</sup>

Though these state-provided figures suggest that the Subcode has been successful, other empirical studies have not yet reached a consensus about the extent of that success.<sup>90</sup> The Brookings Institution has estimated that the Subcode cuts costs of rehabilitation in half.<sup>91</sup> The New Jersey Department of Community Affairs has said that while the Subcode has reduced costs by as much as fifty percent, the average is closer to ten percent.<sup>92</sup> An affordable housing coalition has similarly suggested that the figure is somewhere between

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86. Cf. LISTOKIN & LISTOKIN, *supra* note 34, at 23 ("Almost three-quarters (72 percent) of all residential and nonresidential construction in New Jersey cities as of the mid-1990s consisted of renovation. . . . By contrast, in rural New Jersey communities, new construction dominates—the rehab share is only 19 percent." (citation omitted)).

87. STATE OF N.J. DEP'T OF CMTY. AFFAIRS, THE NEW JERSEY CONSTRUCTION REPORTER: ANNUAL REPORT 1998, at 1 (1999) ("The estimated cost of construction bested last year's mark by more than \$1 billion for a total of \$9,396 million.").

88. *Id.* at 7.

89. STATE OF N.J. DEP'T OF CMTY. AFFAIRS, THE NEW JERSEY CONSTRUCTION REPORTER: ANNUAL REPORT 1999, at v (2000).

90. Instead of conducting empirical research, some writers have simply described the impact on individual buildings. See, e.g., Norah Vincent, *Cracking the Code*, CITY J., Spring 1999, at 13, 13 ("Jersey City's 203 Academy Street, for example, stood vacant for years before the subcode made its rehab financially feasible. Now, the top three floors of the four-story building comprise 24 units of senior-citizen housing, and the bottom floor serves as a day-care center. The building's owners saved nearly \$400,000 renovating under the new rules. In Trenton's historic Mill Hill, the subcode made feasible the conversion of a 1920s garage—boarded up for two decades—into a private residence.").

91. See CHRISTOPHER B. LEINBERGER, BROOKINGS INST., TURNING AROUND DOWNTOWN: TWELVE STEPS TO REVITALIZATION 10-11 (2005), available at [http://www.brookings.edu/metro/pubs/20050307\\_12steps.pdf](http://www.brookings.edu/metro/pubs/20050307_12steps.pdf) ("Adopting a rehabilitation code similar to the current New Jersey Rehabilitation Subcode can cut costs for historic rehabilitation by up to 50 percent . . .").

92. See Forest, *supra* note 84, at 10.

ten and forty percent of costs.<sup>93</sup> And a federally funded analysis of a 200-year-old structure in Chester, New Jersey found that a rehabilitation code could cut costs on that structure by twenty percent.<sup>94</sup>

Whatever the precise extent of the savings created by the Subcode, it is undeniable that more older buildings are being rehabilitated and New Jersey's cities are experiencing substantial reinvestment.<sup>95</sup> Researchers for the Fannie Mae Foundation have revealed preliminary findings that the most substantial positive impacts have benefited developers of smaller projects.<sup>96</sup> The New Jersey Department of Community Affairs asserted that "[w]hile many forces are behind this surge . . . the Rehabilitation Subcode had a vital role."<sup>97</sup> The Subcode has also been boosted by being combined with several other state programs, including "a state brownfields reuse program (including liability protection and financial incentives), expedited state permitting for development in designated centers, and the issue of one billion dollars to acquire and preserve a million acres of founded and open space."<sup>98</sup> The State of New Jersey even received an "Innovations in American Government" award from Harvard University's John F. Kennedy School of Government for its rehabilitation code.<sup>99</sup> Such nationwide attention has encouraged other jurisdictions, like Maryland and Pennsylvania, to mimic the Subcode.

### C. Maryland's Adoption of the Federal Model Code

Maryland became the second state to implement a rehabilitation code when it adopted the Nationally Applicable Recommended Rehabilitation Provisions

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93. See ARIGONI, *supra* note 29, at 25.

94. See NAHB RESEARCH CTR. & U.S. DEP'T OF HOUS. & URBAN DEV., INNOVATIVE REHABILITATION PROVISIONS: A DEMONSTRATION OF THE NATIONALLY APPLICABLE RECOMMENDED REHABILITATION PROVISIONS 1, 20 (1999).

95. Indeed, I have not been able to find a piece of literature or a person criticizing the New Jersey codes.

96. See May, *supra* note 51, at 219.

97. STATE OF N.J. DEP'T OF CMTY. AFFAIRS, *supra* note 89, at v; see also Telephone Interview with John Lago, Hous. Research Manager, N.J. Div. of Codes & Standards, in Trenton, N.J. (Sept. 23, 2005) (arguing that, while the Subcode was important, interest rates and other economic factors played a role in the sustained emphasis on rehabilitation).

98. Timothy Beatley & Richard C. Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 193, 203 (2002) (citations omitted).

99. See John F. Kennedy Sch. of Gov't, Harvard Univ., Innovations in American Government Awards: 1999 Winner: State of New Jersey Rehabilitation Subcode, <http://www.innovations.harvard.edu/awards.html?id=3823> (last visited Mar. 2, 2006).

(NARRP) as the Maryland Rehabilitation Building Code, effective as of June 2001.<sup>100</sup> The NARRP guidelines were prompted in part by the 1995 symposium on the federal government's failure to address rehabilitation.<sup>101</sup> They closely follow the New Jersey laws in structure and content, and their specific provisions will not be repeated here.<sup>102</sup>

The development of the Maryland rehabilitation code was relatively quick, likely as a result of nearby New Jersey's notable successes, and was championed by Maryland Governor Parris Glendening, a staunch advocate of historic preservation.<sup>103</sup> In 2000, Glendening appointed an advisory council on rehabilitation issues and charged the council with evaluating Maryland's heritage preservation efforts, maximizing private investment in rehabilitation, and improving state agency efforts in this area.<sup>104</sup> In short order, the council recommended that the legislature adopt a new rehabilitation code specifically to address older buildings, in addition to other land use reforms. State officials claim that the subsequent adoption of the NARRP guidelines was thus part of a comprehensive planning strategy.<sup>105</sup>

While lobbying for the bill establishing the rehabilitation code, Maryland code officials emphasized the drawbacks of traditional codes—their lack of uniformity, their unpredictability, and their inflexibility—as well as the need for uniform statewide training of code enforcement officials.<sup>106</sup> Testimony by Constance Beaumont of the National Trust for Historic Preservation before the Maryland Senate Economic and Environmental Affairs Committee echoed these sentiments.<sup>107</sup> Citing the disinvestment in Maryland's struggling cities,

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100. See MD. CODE ANN., PUB. SAFETY §§ 12-1001 to -1007 (LexisNexis 2004 & Supp. 2005).

101. See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 61, at 2 (calling for national guidelines and a national model rehabilitation code).

102. See U.S. DEP'T OF HOUS. & URBAN DEV., NATIONALLY APPLICABLE RECOMMENDED REHABILITATION PROVISIONS (1997), available at [http://www.huduser.org/publications/destech/narrp/toc\\_narrp.html](http://www.huduser.org/publications/destech/narrp/toc_narrp.html); U.S. DEP'T OF HOUS. & URBAN DEV., SMART CODES IN YOUR COMMUNITY: A GUIDE TO BUILDING REHABILITATION CODES 11-14 (2001), available at <http://www.huduser.org/Publications/pdf/smartcodes.pdf>.

103. See Parris N. Glendening, *Smart Growth in Maryland*, F.J., Winter 2000, at 16, 16-19 (noting the Glendening Administration's success in encouraging historical preservation).

104. *Id.* at 21.

105. See Telephone Interview with Pat Goucher, Manager, Local Planning Div., Md. Dep't of Planning, in Balt., Md. (Sept. 23, 2005).

106. See Md. Dep't of Nat. Res., Maryland Building Rehabilitation Code Program Overview, [http://www.dnr.state.md.us/education/growfromhere/lesson15/mdp/smartcode/rehab\\_overview.htm](http://www.dnr.state.md.us/education/growfromhere/lesson15/mdp/smartcode/rehab_overview.htm) (last visited Mar. 2, 2006).

107. See *Hearing on H.B. 284 and H.B. 285 Before the Md. S. Econ. & Envtl. Comm.* (Feb. 18, 2000) (Statement of Constance E. Beaumont, Director of State and Local Policy, National Trust



Beaumont observed that “while sprawl development carves up the Maryland countryside, existing buildings representing huge public and private investment stand empty.”<sup>108</sup> Beaumont also claimed that the high incidence of upper-story vacancies in older buildings in Annapolis, Cumberland, Hagerstown, and Baltimore were caused by strict codes that prevented ground-floor shopkeepers from renovating. A rehabilitation code, which scaled requirements to the amount of work being done, would encourage incremental repair and revitalization.<sup>109</sup>

Based in part on such testimony, the Maryland legislature adopted the NARRP as part of a sweeping overhaul of its building codes that consolidated ten statutes dealing with existing buildings.<sup>110</sup> Under the Maryland statute, adoption of the rehabilitation code by localities is not mandatory; however, the state now offers financial incentives for localities that adopt the NARRP guidelines without amendment, including priority for state funding programs, tax credits for historic preservation, and funds for training and implementation.<sup>111</sup> In addition, the state planning department, partnering with the state Fire Marshal’s Office, the American Institute of Architects, the Maryland Home Improvement Contractors Association, and the Maryland Building Officials Association, has begun to offer free or low-cost training for code officials and building professionals on aspects of the new code. Perhaps propelled by such incentives, the City of Baltimore adopted the state rehabilitation code without modification just two months after it was enacted. Governor Glendening lauded the enactment of rehabilitation codes as a means of encouraging the development of neighborhoods like “the kind you find in Annapolis, our state capital and a city whose charm comes from eclectic

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for Historic Preservation) [hereinafter Beaumont Statement], available at [http://www.nationaltrust.org/news/docs/20000218\\_beaumont.html](http://www.nationaltrust.org/news/docs/20000218_beaumont.html).

108. *Id.*; see also *supra* text accompanying note 24.

109. See Beaumont Statement, *supra* note 107.

110. See ELIZABETH G. PIANCA, NAT’L TRUST FOR HISTORIC PRES., SMART CODES: SMART GROWTH TOOLS FOR MAIN STREET 3 (2002), available at [http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit\\_codes.pdf](http://www.nationaltrust.org/issues/smartgrowth/toolkit/toolkit_codes.pdf).

111. See Maryland Building Rehabilitation Code Program Frequently Asked Questions, [http://www.dnr.state.md.us/education/growfromhere/lesson15/MDP/smartcode/rehab\\_faq.htm](http://www.dnr.state.md.us/education/growfromhere/lesson15/MDP/smartcode/rehab_faq.htm) (last visited Mar. 1, 2006) (listing such incentives as “new funds for the Maryland Department of Transportation’s Neighborhood Conservation Program, the State’s Rural Legacy Program, and a new low interest mort[g]age finance program through the Department of Housing and Community Development” and \$300,000 for training and assistance in implementing the new code).

streetscapes and historic architecture that would not be allowed under modern codes.”<sup>112</sup>

Despite such rosy rhetoric, Maryland’s codes have not been as successful as New Jersey’s. The primary reason is that Maryland is a home-rule state and leaves the powers of adopting and amending the code to the various municipalities. This arrangement “attempts to balance respect for local autonomy with the desire for uniformity and simplicity by architects and contractors who work in various communities.”<sup>113</sup> Maryland’s approach goes too far, however, in respecting local autonomy and not far enough in simplifying the patchwork of codes that is used across the state. Because municipalities are given incentives not to amend the code—but are not given incentives to explicitly adopt the code—only a few local jurisdictions have adopted it. And even in those jurisdictions that have adopted the rehabilitation code, local code officials may be reluctant to correct architects or builders who mistakenly believe that they must comply with the more familiar traditional code.<sup>114</sup> Finally, only one state-level administrator is specifically responsible for rehabilitation code issues, leading one to question whether the state can effectively monitor rehabilitation code activity.<sup>115</sup>

Perhaps because of its tiny staff, Maryland does not keep statistics on either levels of construction activity within local jurisdictions or levels of rehabilitation versus new construction, so it is difficult to empirically verify the progress of the state’s rehabilitation code. If the qualitative data presented in this Section are any indication, Maryland’s code has had mixed results. State code officials are now trying to resurrect the advisory council and hope to charge that council with considering whether to adopt the 2006 International Existing Building Code.<sup>116</sup> However, they will likely not consider making such a code mandatory.<sup>117</sup>

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112. Parris N. Glendening, *Maryland: “Smart Growth Has Propelled Us into a New Era,”* F.J., Fall 2002, at 15, 20.

113. See PIANCA, *supra* note 110, at 3.

114. Telephone Interview with James Hanna, Dir. of Md. Codes Admin., Md. Dep’t of Planning, in Crownsville, Md. (Oct. 11, 2005).

115. Telephone Interview with Jim Magliano, Code Enforcement Officer, Md. Dep’t of Hous. & Cmty. Dev., in Crownsville, Md. (Jan. 17, 2006).

116. *Id.*

117. *Id.*

*D. Pennsylvania's Adoption of the International Existing Building Code*

As in Maryland, Pennsylvania's rehabilitation code has been only partially successful, since Pennsylvania has not implemented and enforced its code in a coherent manner. The rehabilitation code was adopted in 1999, as part of a group of codes that became Pennsylvania's statewide building code, the Uniform Construction Code (UCC).<sup>118</sup> The UCC incorporates several codes issued by the International Code Council, including the International Existing Building Code (IEBC), and applies to the "construction, alteration, repair and occupancy of all buildings" in Pennsylvania.<sup>119</sup> The UCC does not apply to nonresidential structures designated as historic by local, state, or federal authorities so long as code officials have certified such structures to be safe.<sup>120</sup> Specifically, the IEBC portion of Pennsylvania's UCC applies to repairs, alterations, changes of occupancy, additions, and relocations of existing, previously occupied buildings or portions of buildings. Code officials who administer the UCC must be certified by the State Department of Labor and Industry,<sup>121</sup> and are eligible to receive training and technical assistance,<sup>122</sup> including special courses on the IEBC.<sup>123</sup> The code provides officials with information about fire ratings for antiquated methods of construction, such as wood lath and plaster walls, to help them decide how the rules should be applied.<sup>124</sup> It also signals a departure from the prescriptive standards that specify materials and usage.

118. See 35 PA. CONS. STAT. ANN. §§ 7210.101 to .1103 (West 2005) (laying out the provisions of the UCC).

119. *Id.* § 7210.104(a)-(b) (excluding both (a) alterations to residential buildings that do not make either structural changes or changes to means of egress and (b) repairs to residential buildings).

120. *Id.* § 7210.902.

121. See 34 PA. CODE § 401.3(a) (2005) ("A person may not perform a plan review of construction documents, inspect construction or equipment, or administer and enforce the Uniform Construction Code without being currently certified or registered by the Department in the category applicable to the work that is to be performed.").

122. See 35 PA. CONS. STAT. ANN. § 7210.501(g) (West 2005) ("The Governor's Center for Local Government Services in the Department of Community and Economic Development shall be the principal agency for developing and providing technical assistance to municipalities for implementing, administering and enforcing the provisions of this act.").

123. See Pa. Constr. Codes Acad., Administrative Course Descriptions, [http://www.paconstructioncodesacademy.org/course\\_descriptions.shtml](http://www.paconstructioncodesacademy.org/course_descriptions.shtml) (last visited Jan. 24, 2006).

124. See Thomas Hylton, Opinion, *A No-Cost Boost for Cities and Towns: The New Statewide Construction Code Makes It Far Easier To Renovate Existing Buildings*, PITTSBURGH POST-GAZETTE, July 28, 2004, at A19, available at <http://www.post-gazette.com/pg/04210/352829.stm>.

The adoption of a rehabilitation code was prompted in large part by problems facing Pennsylvania's cities. To take one prominent example, Pittsburgh's planning department issued a plan in 1998 that called for the modification and streamlining of building codes to better address adaptive reuse.<sup>125</sup> One reporter commented that developers felt too uncertain about the existing construction approval process to renovate older urban structures, noting that "the upper floors of hundreds of commercial buildings throughout southwestern Pennsylvania have remained vacant for decades—it hasn't made economic sense to bring them up to code."<sup>126</sup> Of particular concern to planners were the empty and abandoned "sliver" buildings and small skyscrapers of the city's downtown. Sliver buildings—narrow structures usually between two and eight stories tall—violated existing local building code requirements for fire egress since they only had one exit on their upper floors.<sup>127</sup> Similarly, many small skyscrapers—between nine and twenty stories tall—had undersized floorplates and only one means of egress on the upper floors.<sup>128</sup> Under the existing Pittsburgh local code, neither sliver buildings nor small skyscrapers could be modified without substantial financial investment. As the city planning department noted in its 1998 plan: "Building codes and the code compliance process, to date, have not always acknowledged the special situations presented by these types of adaptive reuse projects."<sup>129</sup> City officials, however, did not call for specific, immediate changes to be made to the city's building code because the publication of the Pittsburgh plan coincided with state legislators' consideration of a statewide building code, the adoption of which would eventually replace the Pittsburgh code.<sup>130</sup> Instead, the follow-up study to the plan document called only for public awareness, technical assistance, and a better review and appeals process.<sup>131</sup>

Though the IEBC text indicates support for rehabilitation, Pennsylvania's implementation of the IEBC has sometimes worked against that goal. Despite

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125. See DEP'T OF CITY PLANNING, CITY OF PITTSBURGH, *THE PITTSBURGH DOWNTOWN PLAN: A BLUEPRINT FOR THE 21ST CENTURY* 107 (1998), available at <http://www.city.pittsburgh.pa.us/downloads/documents/plandoc.pdf>.

126. Hylton, *supra* note 124.

127. See DEP'T OF CITY PLANNING, CITY OF PITTSBURGH, *ADAPTIVE REUSE BUILDING CODE STUDY* 12 (1998), available at <http://www.city.pittsburgh.pa.us/downloads/documents/AdaptReu.pdf> (estimating that twenty-five percent of the sliver buildings were abandoned or underutilized).

128. *Id.* at 4.

129. DEP'T OF CITY PLANNING, *supra* note 125, at 21.

130. DEP'T OF CITY PLANNING, *supra* note 127, at 6.

131. *Id.*

the IEBC's statewide applicability, municipalities are able to amend the IEBC so long as the amendments exceed IEBC requirements.<sup>132</sup> The ability for each municipality to make such amendments raises concerns about the code's statewide uniformity. In addition, municipalities can choose whether to enforce the code themselves or leave the enforcement to state code officials or third-party private firms hired by building owners or their contractors. While the vast majority of Pennsylvania's 2564 municipalities have "opted in" to enforcing the IEBC,<sup>133</sup> nearly 300 municipalities have opted out.<sup>134</sup>

In opt-out jurisdictions, two problems have emerged. First, if the state is called in to review a building, it charges twice as much for existing buildings as it does for new buildings.<sup>135</sup> Such fees are viewed as a source of revenue for the state, but tend to have a dampening effect on rehabilitation.<sup>136</sup> Second, in opt-out jurisdictions, only third-party firms review residential structures; for budgetary reasons, the state's coding authority does not actually exercise jurisdiction over residential structures.<sup>137</sup> Leaving third-party firms to fill the gaps can lead to uneven enforcement in opt-out municipalities and can thwart cities' abilities to solve the very problems that the rehabilitation code was meant to address. For example, in 2004, a downtown Pittsburgh coalition revisited the problem of vacant buildings and found that residential conversions could only be achieved through the use of variances and not under existing IEBC rules.<sup>138</sup>

The legislature passed a bill in late 2005 that has only added to the difficulties in enforcing the building code.<sup>139</sup> That law addressed a

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132. Telephone Interview with Bill Gottardy, Plan Exam'r, Pa. Dep't of Labor & Indus., in Harrisburg, Pa. (Jan. 13, 2006).

133. Technically, municipalities do not choose whether to opt in to the IEBC specifically. Instead, they choose whether to opt in to the UCC generally, of which the IEBC is one part. See Pa. Dep't of Labor & Indus., Municipal Decisions Regarding Local Enforcement of the UCC, <http://www.dli.state.pa.us/landi/lib/landi/ucc/uccmun.htm> (last visited Jan. 25, 2006).

134. 10,000 Friends of Pa., Building Codes, [http://www.1000ofriends.org/revitalizing/buildingcodes/rehab\\_code2](http://www.1000ofriends.org/revitalizing/buildingcodes/rehab_code2) (last visited Mar. 2, 2006).

135. *Id.*

136. If towns and municipalities enforce the code themselves, however, the towns and municipalities can charge fees as they choose.

137. Telephone Interview with Bill Gottardy, *supra* note 132.

138. THE PITTSBURGH DOWNTOWN LIVING INITIATIVE, THE VACANT UPPER FLOORS PROJECT 59 (2004), available at <http://www.pghliving.com/images/properties/vuf.pdf>.

139. S.B. 736, 2005 Gen. Assemb., Reg. Sess. (Pa. 2005), available at <http://www2.legis.state.pa.us/wu01/li/bi/bt/2005/o/sb0736p1411.pdf>; Senate Bill 376 History, <http://www.legis.state.pa.us/wu01/li/bi/bh/2005/o/SB0736.htm> (noting that Governor Ed Rendell signed the bill on December 22, 2005).

controversial declaration by state coding officials that any existing building lacking appropriate occupancy permits was “illegal” and therefore had to comply with new construction regulations.<sup>140</sup> The bill’s sponsor, Senator Bob Robbins, summarized the three ways in which his bill would address that issue: by (1) “grandfather[ing] any commercial or industrial structure that was occupied prior to April 14, 2004, and did not possess an occupancy permit”; (2) “allow[ing] municipal [UCC] inspectors the ability to issue permits, provide inspections, and issue occupancy permits on any additions and improvements to these existing structures”; and (3) “providing [municipalities] with immunity from any actions that may arise from the original structure’s occupancy.”<sup>141</sup> Under the statute, municipalities now have more power to flexibly address the special problems of existing buildings. But state building officials are concerned that some of the grandfathered buildings will be a public safety risk because these buildings have never been inspected by any authority.<sup>142</sup> Thus, while the bill is laudable for making rehabilitation laws more flexible, its history emphasizes the failures in the process of negotiating among various groups and the inability of Pennsylvania’s legislature to implement a code with comprehensive impact.

### III. THE FUTURE OF REHABILITATION CODES

Now that several states have experimented with rehabilitation codes, and a major coding organization and the federal government have developed model rehabilitation codes, the tools to popularize rehabilitation codes are in place. As Part II explains, however, only a few jurisdictions have adopted rehabilitation codes, and those that have adopted such codes have seen uneven results. The primary barrier to rehabilitation code adoption seems to be institutional inertia. To implement a true rehabilitation code, policymakers must either make significant changes to existing codes or develop new codes. But many think that tinkering with existing codes would be too confusing, and moreover, that adopting a new, separate code addressing rehabilitation would require a major departure from the status quo of the traditional code. The stymied progress of a 2005 Connecticut bill that would have required the state to establish a rehabilitation code exemplifies this problem.<sup>143</sup> Connecticut, one of

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140. See 10,000 Friends of Pa., *supra* note 134.

141. Press Release, Senator Bob Robbins, Pa. State Senate, Robbins Introduces Bill To Make Pennsylvania’s Construction Code More Flexible (June 14, 2005), <http://robbins.pasenategop.com/2005-press/061405.htm>.

142. Telephone Interview with Bill Gottardy, *supra* note 132.

143. H.B. 6193, 2005 Gen. Assemb., Jan. Sess. (Conn. 2005).

the few states with a statewide mandatory building code, seems an ideal candidate for a rehabilitation code. Yet the bill never made it out of legislative committee. The bill's sponsor, Representative Robert Keeley, has attributed the bill's stagnation to elected officials' perception that the public was indifferent both to the proposal and to the opposition of fire and building code officials.<sup>144</sup> Keeley speculated that these officials opposed the bill because they did not want the practical burden of implementing a rehabilitation code, and because they did not understand such codes' potentially transformative powers.<sup>145</sup>

Code officials may have practical reasons to resist a new rehabilitation code. Building departments are woefully underfunded. A recent survey of 806 code administrators reported that "[m]ore than half of [code] administrators indicate their overall budget is insufficient and estimate that an increase in the range of 11 to 25 percent is needed."<sup>146</sup> Adoption of new rehabilitation provisions might impose implementation and training costs that local building departments are unwilling to bear. Code administration departments are also understaffed. According to the same survey, "47 percent [of building code administrators] feel they are not adequately staffed to complete all necessary inspections of construction work, and about the same number (46 percent) say they do not have the staff to handle their responsibilities for reviewing plans."<sup>147</sup> Chronic understaffing of building departments prevents code officials, who struggle to keep up with day-to-day enforcement activities, from conducting thorough reviews or proposing code modifications. This hinders reform because these officials best know codes' strengths and weaknesses.<sup>148</sup> Thus, even if officials acknowledged the benefits of rehabilitation codes, they might not have the time or ability to promote their adoption. In fact, they may even—as has been the case in Connecticut—become the most vocal opponents of rehabilitation codes.

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<sup>144</sup>. Telephone Interview with Representative Robert Keeley, Conn. Gen. Assembly, in Bridgeport, Conn. (Dec. 6, 2005).

<sup>145</sup>. *Id.*

<sup>146</sup>. See *Survey Reveals Need To Bolster Building Departments*, RISK MGMT., Apr. 1996, at 14, 14.

<sup>147</sup>. *Id.*; see also Ben-Joseph, *supra* note 45, at 2 (noting that "many [code administrators] also acknowledge that delays are also caused by the bureaucratic process related to . . . understaffing").

<sup>148</sup>. But see NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 44, at 259 (noting that code officials in large cities are generally more likely to review and modify their codes); JERRY J. SALAMA ET AL., REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY (1999) (describing the complex and often-changing code of New York City).

To overcome the problem of institutional inertia, rehabilitation code proponents should adopt sound implementation strategies. First, they must emphasize statewide mandatory adoption above all other approaches, lest the codes become burdened with the same problems that affect traditional codes. Second, proponents should build strategic alliances with union members, historic preservation officials, and national groups of public officials to initiate and pass legislation. Third, they must build on the growing public sentiment that old buildings and inner cities are valuable resources and should be protected by raising awareness about both the benefits of rehabilitation and the importance of codes.

#### *A. Emphasizing the Mandatory Statewide Approach*

Rehabilitation proponents should look to New Jersey as a model for sound rehabilitation coding and should emphasize the mandatory statewide approach in future code enactments. This Section first argues that state-level adoption is more appealing than either federal or local adoption. It then advocates mandatory coding, discussing how rehabilitation code proponents should resolve areas of contention that may arise when promulgating mandatory codes.

##### *1. State-Level Adoption*

Professionals, government commissions, and other commentators have called for greater federal involvement in building regulation—with some advocating model nationwide building codes, and others advocating mandatory nationwide building codes.<sup>149</sup> Theoretically, the advantages of a federal building code are many: centralization of coding authority, uniformity of requirements across jurisdictions, and more even enforcement. Indeed, federal building regulations have proven highly successful at addressing special issues that traditional building codes have neglected, such as the construction

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<sup>149</sup> See, e.g., ADVISORY COMM'N ON INTERGOV. RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 83 (1966) (suggesting that the federal government draft model national performance criteria and standards for building construction); FIELD & RIVKIN, *supra* note 45, at 118 (advocating that the federal government use the Commerce Clause to mandate a building code); NAT'L COMM'N ON URBAN PROBLEMS, *supra* note 44, at 269 (suggesting “model standards to be incorporated in local building codes with special reference to the rehabilitation of existing housing”);.



of manufactured homes<sup>150</sup> and the provision of access for the disabled.<sup>151</sup> One could argue that a rehabilitation code should be similarly mandated on a national basis, because few building codes provide for rehabilitation and because rehabilitation implicates issues of nationwide concern.<sup>152</sup>

Despite the importance of encouraging rehabilitation, however, rehabilitation guidelines apply too broadly to merit a federal response. Codifying them at the national level would undermine the United States's strong tradition of state control over generally applicable building regulations.<sup>153</sup> Nationwide uniformity would also prevent states from competing against each other for the most attractive rehabilitation code regimes: As two professors recently observed, state laws regarding real property, such as building codes, can encourage interstate competition and trigger a race to the top.<sup>154</sup> The race-to-the-top theory may explain why so many contiguous mid-Atlantic states have adopted rehabilitation codes. Moreover, federal adoption does not accommodate geographic differences: California, for instance, would need a stricter rehabilitation code to address seismic activity,<sup>155</sup> but applying stricter seismic regulations to other states would be inefficient. Finally, enacting building regulations on a national level would allow for interest groups to impose sweeping—and potentially negative—change simply by lobbying one body, Congress.<sup>156</sup> Practically speaking, various efforts to consolidate building codes from the top down have failed.<sup>157</sup> Even HUD now recognizes that the federal government should leave regulations like rehabilitation codes to state and local governments.<sup>158</sup>

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150. See National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426 (2000).

151. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

152. See *supra* Section II.A (noting some of the ways in which the federal government has acknowledged that rehabilitation is of nationwide concern).

153. See D.E. DOBSON, NAT'L BLDG. RES. INST., BULL. NO. 54, BUILDING REGULATIONS: A REVIEW OF THE POSITION IN SOME WESTERN COUNTRIES 105 (1968) (comparing several western countries' approaches to building code legislation).

154. Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 99-100 (2005).

155. See Coffin, *supra* note 7, at 48 (crediting the state's stringent building codes with lessening the potential earthquake damage that could be inflicted on California).

156. See Bell & Parchomovsky, *supra* note 154, at 99-100 (describing a fear of this phenomenon in a related property law context).

157. See ADVISORY COMM'N ON INTERGOV. RELATIONS, *supra* note 149, at 71-77 (describing numerous efforts by the federal government and the model code councils to negotiate a common building code form).

158. See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 31, at 14.

But local adoption of rehabilitation codes – while better than no adoption at all – also has serious problems, notably that it encourages inefficiencies in updating codes, code administration, and training code officials. Because local adoption is inherently inefficient, smaller localities may not be willing or able to adopt rehabilitation codes; they may be further deterred by the costs of implementing and enforcing a new, separate code. Local adoption also prevents commercial rehabilitation firms from transporting similar practices from one place to another.

While many building codes are still administered on a local level, states have dramatically increased their activity in the building code arena since the 1970s, roughly corresponding to an overall augmentation of states' spending and taxing authority.<sup>159</sup> In 1971, Connecticut became the first state to implement a complete statewide mandatory building code,<sup>160</sup> and other states have followed suit with mandatory or model codes.<sup>161</sup> In sum, given the strong tradition of federalism in coding, the inefficiencies and difficulties involved in local code adoption, and the increasing tendency among states to engage in coding activity, the adoption of rehabilitation codes at the state level is both desirable in theory and feasible in practice.

## 2. *Mandatory Adoption*

The case studies in this Note demonstrate that mandatory coding is more desirable than model coding. As Maryland's experience indicates, nonmandatory model rehabilitation codes have many of the problems that traditional codes do. Adoption of model codes may be slow to take effect, and local jurisdictions may update them only in a piecemeal manner. Model codes also cause disharmony across jurisdictions: some localities may adopt a model code, while others may not.<sup>162</sup> Mandatory coding, on the other hand, ensures uniformity both in the legal standards themselves and in the updating of those

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159. See Bahl, *supra* note 22, at 299 (reporting that state governments' share of total state and local spending rose from thirty-seven percent in 1970 to forty percent in 1990, while their share of taxes rose from fifty-five percent to sixty percent).

160. See Office of State Bldg. Inspector, State of Conn., History of the State Building Code in Connecticut, <http://www.ct.gov/dps/cwp/view.asp?a=2148&Q=294180> (last visited Mar. 13, 2006).

161. See ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., *supra* note 31, at 15 (calling states' efforts to reform the building code regulatory system "substantial progress").

162. Again, a reminder that uniformity is a worthwhile aim: "[G]reater uniformity in building codes would lower the costs of construction without compromising housing quality and safety, would facilitate the mass production of housing components, and would provide stronger incentives for research and development." Oster & Quigley, *supra* note 3, at 365.

standards. Moreover, mandatory coding can demonstrate a statewide commitment to rehabilitation as a public good.

If rehabilitation proponents advocate mandatory codes, however, they may find two areas of resistance. First, local governments may protest that they are not able to administer a separate rehabilitation code without additional funding.<sup>163</sup> In addition, enforcement may not be uniform across jurisdictions—even if the written standards are uniform. One way to solve these problems would be for the states to provide code officials with training regarding the rehabilitation code and to require, as some states already do, statewide certification of code officials. The state could also provide technical assistance to local governments, with the additional expense being justified on the ground that encouraging rehabilitation is an important statewide goal. Local governments would therefore be relieved of training and other costs, and the uniformity problem would be solved. This arrangement is used in other states: In Maryland, for example, the state spends about \$45,000 annually from the Department of Housing and Community Development general budget to run three courses for local code officials, architects, and building professionals.<sup>164</sup> New Jersey takes a different approach, covering the cost of inspector training through the collection of permitting surcharge fees amounting to \$1.35 per thousand dollars of the value of construction.<sup>165</sup> In both New Jersey and Maryland, the education programs come at no cost to the local inspectors.

Second, there may be dismay at mandatory codes' extension of regulation to geographic areas where no regulation currently exists. While codes are often implemented by towns, they are not generally in effect in rural areas and are not often implemented by counties. As one example, a comprehensive survey of Iowa counties revealed that 76.6% of the sixty-four responding county officials indicated that their county did not have a building code.<sup>166</sup> In Iowa, towns and counties must pass a local ordinance adopting the statewide building code, with the exception of the plumbing code, disability access rules, and public accommodation requirements, which are already mandatory statewide.<sup>167</sup> Although the Iowa survey is out of date and more counties have since adopted the statewide code, it is possible that some communities remain too small to

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163. See *supra* text accompanying note 146.

164. Telephone Interview with Jim Magliano, *supra* note 115.

165. Telephone Interview with John Terry, Supervisor for Code Assistance, N.J. Dep't of Cmty. Affairs, in Trenton, N.J. (Jan. 17, 2006).

166. Joseph H. Bornong & Bradley R. Peyton, *Rural Land Use Regulation in Iowa: An Empirical Analysis of County Board of Adjustment Practices*, 68 IOWA L. REV. 1083, 1270 tbl.15 (1983).

167. See 28 Iowa Admin. Bull. 413 (Sept. 14, 2005), available at <http://www.legis.state.ia.us/Rules/2005/Bulletin/IAB/050914.pdf>.

have building departments, code inspectors, or a mechanism for enforcement. Subjecting these communities to a building code may not make sense, either on a fiscal or enforcement level. Perhaps a compromise with regard to a mandatory rehabilitation code would be to limit its applicability to towns, cities, or counties over a certain population size or to mandate it only in communities with building department officers. While developing a mandatory code at a statewide level may involve some areas of contention, it is both feasible and preferable to either model coding or coding at the federal or local levels.

### *B. Creating New Strategic Alliances*

As Part II indicates, rehabilitation codes cannot be passed without broad support. In New Jersey, a variety of individuals were brought together by the state community development office and Rutgers University to draft the rehabilitation subcode. Subsequent public comments on these drafts further improved the end result. In Maryland, a rehabilitation advisory council, which updates the code, consists of five state-level public officials, four building trade representatives with experience in code creation, two architects, two contractors, two representatives each of municipal and county governments, two representatives of code councils, two developers, two members of the public, and several fire officials.<sup>168</sup> (Notably missing, or late to the discussion, have been union representatives and historic preservation officials.) Rehabilitation proponents should work to create strategic alliances with those groups, as well as national elected official bodies, all of which are currently underutilized with respect to rehabilitation code activity.<sup>169</sup> By targeting groups both inside and outside of government, proponents may succeed in getting rehabilitation on the agenda.

Rehabilitation code promoters may also wish to target construction unions for greater support of rehabilitation codes. Prior studies have shown that “[c]onstruction unions prefer a strict building code, and the stronger they are, the stricter the code is found to be.”<sup>170</sup> Used here, the term “strict” is

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<sup>168</sup> MD. CODE ANN., PUB. SAFETY § 12-1003 (LexisNexis 2004 & Supp. 2005).

<sup>169</sup> Cf. Andres Duany, *A Long-Range Vision for Cities, and for Preservation*, F.J., Winter 2003, at 39, 42 (calling for environmentalists, planners, and preservationists to come together, saying that “we do desperately need each other for cross-education and to back each other in the many, many campaigns that must be fought”).

<sup>170</sup> Eli Noam, *Market Power and Regulation: A Simultaneous Approach*, 32 J. INDUS. ECON. 335, 341 (1984).

synonymous with “labor-intensive.”<sup>171</sup> Similarly, union members are likely supporters of rehabilitation codes because rehabilitation projects are often more labor-intensive than new projects and more likely require greater professional involvement. Educating unions about the importance of code reform and involving them in the adoption process could be an effective strategy for getting rehabilitation codes adopted in more places.

In addition, historic preservation officials should be more actively engaged in the development of code reform. Though the National Trust for Historic Preservation has been marginally involved in some adoption efforts, the organizational capabilities of the Trust are minimal.<sup>172</sup> Rehabilitation code proponents should convince state historic preservation offices (SHPOs), the official historic preservation agency of each state, to begin conversations in state governments about the importance of codes.<sup>173</sup> The SHPOs include 1100 professional preservationists—far more than the 300 or so National Trust staff members and the staffs of the forty-two nonprofit, private statewide preservation organizations (with at least one full-time staff member) combined.<sup>174</sup> The SHPOs, by definition, believe that older buildings have value; moreover, the SHPOs have the experience and grassroots support to advance the rehabilitation code cause. While they traditionally focus on designated historic structures, the SHPOs nonetheless should be willing and capable supporters of rehabilitation codes.

Finally, rehabilitation code proponents should target two nationwide organizations of elected officials: the U.S. Conference of Mayors and the National Governors’ Association.<sup>175</sup> Both organizations have annual meetings at which issues are presented, as well as fora in which member-elected officials can exchange best practices.<sup>176</sup> Neither group has conducted a thorough review

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171. At least one other study indicates that the size of local construction firms and the organization of unions has an effect on local governments’ willingness to accept cost-reducing code innovations. See Oster & Quigley, *supra* note 3, at 376–77.

172. See *supra* text accompanying notes 107–108.

173. See Nat’l Park Serv., State Historic Preservation Officers, <http://grants.cr.nps.gov/shpos> (last visited Mar. 1, 2006).

174. See Edward F. Sanderson, *Restoration Needed: Preserving SHPOs in the National Historic Preservation Program*, F.J., Spring 2003, at 20, 22–23 (arguing that SHPOs need more funding to fulfill their mission). These forty-two private preservation organizations vary in nature but tend to supplement the work of the public SHPOs.

175. The early elected proponents of rehabilitation codes—like Maryland’s Governor Glendening and New Jersey’s Governor Christine Todd Whitman—are no longer in public office and are not members of these groups.

176. See NGA Center for Best Practices, <http://www.nga.org/portal/site/nga/menuitem.50aeae5ff70b817ae8ebb856a11010a0> (last visited Mar. 1, 2006); U.S. Conference of Mayors,

of rehabilitation codes, though the governors' group included rehabilitation codes as part of its 2001 "growth tool kit" and the mayors' group mentioned rehabilitation codes as part of its 2002 housing agenda.<sup>177</sup> In addition, the National League of Cities, a group representing municipal governments, should be more involved in promoting rehabilitation codes. An education campaign targeted at these organizations could help to spread information about rehabilitation codes to the states, who could most effectively and efficiently adopt them.

*C. Building on Growing Public Support for Old Buildings and Inner Cities*

Rehabilitation code proponents would do well to build on the growing support for both urban areas and historic properties.<sup>178</sup> They should argue for rehabilitation codes within the context of those movements and raise public awareness about their importance. Though traditional coding is widespread, rehabilitation codes have not yet gained popular appeal because information about rehabilitation codes has not been disseminated adequately. Before rehabilitation codes can change the way we build, more people must know about their positive effects.

Proponents should situate rehabilitation codes in the context of a broad revitalization strategy, as New Jersey, Maryland, and Pennsylvania have attempted to do. Nonprofit groups like Smart Growth America, the Local Initiatives Support Corporation, and the Center for Policy Alternatives have argued that rehabilitation codes can be part of a larger strategy to renew American cities.<sup>179</sup> Local politicians are also helping to disseminate more

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Best Practices Database, [http://www.usmayors.org/uscm/best\\_practices](http://www.usmayors.org/uscm/best_practices) (last visited Jan. 25, 2006).

177. See Nat'l Governors Ass'n, Growth Tool Kit: Modernize Zoning Regulations and Building Codes (June 1, 2001), <http://www.nga.org/portal/site/nga/menuitem.50aeae5ff70b817ae8ebb856a11010a0> (search for "modernize zoning regulations"); U.S. Conference of Mayors, National Housing Agenda: A Springboard for Families [sic], Communit[i]es, Our Nation (June 3, 2002), [http://www.usmayors.org/uscm/us\\_mayor\\_newspaper/documents/06\\_03\\_02/housing\\_agenda.asp](http://www.usmayors.org/uscm/us_mayor_newspaper/documents/06_03_02/housing_agenda.asp) ("Cities should reduce the regulatory costs of housing production and rehabilitation by streamlining building codes, inspection and the permit process as well as by adopting 'smart codes.'").

178. See *supra* Part II.

179. See, e.g., CTR. FOR POLICY ALTERNATIVES, *supra* note 32, at 308-10; REID EWING ET AL., MEASURING SPRAWL AND ITS IMPACT 6, 22-23 (2002), available at <http://www.smartgrowthamerica.org/sprawllindex/MeasuringSprawl.PDF>; Local Initiatives Support Corp., Growing Smart Neighborhoods: Information, Models and Trends for Community Developers (May 2002), [http://www.lisc.org/files/830\\_file\\_asset\\_upload\\_file702\\_810.pdf](http://www.lisc.org/files/830_file_asset_upload_file702_810.pdf).

information about the power of rehabilitation codes. Memphis's Housing and Community Development division has argued for rehabilitation codes to be part of the city's revitalization and community development efforts, which also include improvements in affordable housing, changes in code enforcement, and strategies for rebuilding abandoned properties.<sup>180</sup> More recently, a city council candidate in Auburn, New York, put rehabilitation codes on his platform after estimating his personal costs in renovating an older home.<sup>181</sup> Rehabilitation code proponents should continue the strategy of public education and placing codes within a broader set of reforms.

Despite this progress, more must be done. As Steven Rivkin remarked, we cannot expect dramatic code reform "so long as the initiative for reform comes solely from the unprodded generosity of bureaucracies and interest groups that must ultimately protect their own economic positions."<sup>182</sup> The average citizen is rarely involved in code adoption, in part due to her unfamiliarity with codes' technical aspects and implications. Some believe that citizens' interests may be cared for by representatives from the building industry: Homebuilders, for example, may push for the adoption of innovations where housing demand is rapidly increasing.<sup>183</sup> But while consumer interests may sometimes overlap with those of unions and builders, there is room for more citizen activity in code drafting. Indeed, the average voter is an essential part of code reform because the primary actors with the ability to adopt or change codes are elected officials. While code officials may recognize the value of rehabilitation codes, officials do not always control code content—local jurisdictions often have elected councils that have the final say. Legislatures and elected bodies, while sympathetic to the goals of rehabilitation codes, may be reluctant to enact radical change without confidence that the public will support it.<sup>184</sup>

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180. See Robert Lipscomb, *Paving the Way to Livable Neighborhoods*, COM. APPEAL (Memphis, Tenn.), Apr. 18, 2004, at B5.

181. See John Stith, *Graney Sees Deterioration of Neighborhoods as Issue*, POST-STANDARD (Syracuse, N.Y.), Nov. 3, 2005, at 11.

182. Steven R. Rivkin, *Courting Change: Using Litigation To Reform Local Building Codes*, 26 RUTGERS L. REV. 774, 776 (1973). Rivkin made this point primarily to advocate a litigation strategy attacking traditional building codes on antitrust, due process, and interstate commerce grounds—something that this Note does not advocate. See *id.* at 783-800; see also FIELD & RIVKIN, *supra* note 45, at 109-15 (reiterating the approach of Rivkin's law review article). Nonetheless, his words have meaning for our purposes as well.

183. See Oster & Quigley, *supra* note 3, at 367.

184. See *supra* text accompanying notes 143-145.

**CONCLUSION**

Coding is necessary: It saves lives, reduces externalities, and addresses moral hazard problems. Traditional building codes, however, which still dominate the vast majority of local jurisdictions, fail to encourage, and can even deter, rehabilitation. Rehabilitation codes balance the concerns that motivate traditional building codes—safety, health, accessibility, and uniformity—with a flexible approach that provides standards, not rules, thus imposing less stringent requirements on renovators. As a result, rehabilitation codes can further the public interest in encouraging rehabilitation and in improving our central cities. We should work to enact rehabilitation codes on a mandatory basis in more states, since doing so respects our federalist tradition in property law. Enacting rehabilitation codes in more states should become a higher priority for anyone who cares about our built environment.